Supreme Court, U.S.
FILED

942128 JUN 27 1995

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

TUAHA MIAN,

Petitioner,

v.

DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION, a Delaware Corporation, *and* SMITH BARNEY, HARRIS UPHAM & CO., INCORPORATED, a Delaware Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner,
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Apt. # 2205
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June 23, 1995

QUESTIONS PRESENTED

1. Whether the acts of Ex Parte communication with the arbitrators, deliberate presentation of perjured testimony and bribing the arbitrators with cash constitute normal securities arbitration procedures allowed by law as to which the courts of appeal are in conflict.

2. Whether departure from normal procedures can supply evidence of discriminatory intent for Title 42 of United States Code Section 1981 claim as to which the courts of appeal are in conflict.

3. Whether the McDonnell-Douglas test applies to summary judgment proceeding in non-employment discrimination Section 1981 Title 42 U.S.C. claim as to which the courts of appeal are in conflict.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Tuaha Mian ("Mian")[1], seeks a writ of certiorari to review the order of

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1. Petitioner Tuaha Mian, pro se, is not an attorney, is a chemical engineer by education, is an Indian born immigrant to the United States, was the customer of the

the United States Court of Appeals for the Second Circuit which ignored to consider and address (as ignored by the District Court of Southern District of New York) that Ex Parte communication, deliberate presentation of perjured testimony and bribery are not normal procedures of securities arbitration, that departure from normal procedures can supply evidence of discriminatory intent and that McDonnell-Douglas test applies to the summary judgment proceeding in Section 1981 claim.

OPINIONS BELOW

The order of the Court of Appeals (no opinion was issued) dated June 2, 1995 appears in Appendix ("App.") A to this petition. The memorandum and order ("ORDER")

Respondents, was the pro se claimant in the prior arbitration against Respondents, was the pro se plaintiff in the District Court and was the pro se appellant in the Court of Appeals for the Second Circuit.

of the District Court dated September 8, 1994 appears in App. B to this petition.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued it's order on June 2, 1995 (App.A). This petition for a writ of certiorari is being docketed in this Court within 90 days therefrom. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The United States District Court of Southern District of New York had jurisdiction pursuant to Federal Question Jurisdiction 28 U.S.C.A. §§ 1331, 1343, 42 U.S.C.A.§§§ 1981,1985(3) and 1986 and the court's pendant jurisdiction was also invoked for New York and Florida State law violations. Venue was in the Southern

District of New York pursuant to 28 U.S.C.A. § 1391.

In September 1989 Mian filed a claim with National Association of Securities Dealers Inc.'s arbitration department ("NASD") against respondent Donaldson, Lufkin & Jenrette Securities Corporation ("DLJ"). Separately in September 1989 Mian filed a claim with NASD against respondent Smith Barney Harris Upham & Co.Inc.("SB"). DLJ and SB are members of NASD. Mian alleged that the stock brokers[2] called Mian via telephone at Mian's hotel (while Mian was vacationing in Pakistan: July-October 1987) and lied to Mian by stating that the analyst was recommending purchase of stocks while in fact the analyst was not. Mian asked for the return of his money. During arbitration

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2. DLJ stock broker Mr. Alain Ohayon who was an ex employee of SB knew Mr. Sandy Jukel who was SB stock broker.

respondents sent ex parte documents (which contained false statements as evidence) to arbitrators, deliberately presented perjured testimony to the arbitrators and bribed the arbitrators with bundle of cash after which corrupted arbitrators denied Mian's claims.

On June 1, 1992 Mian filed a Section 1981 complaint in the District Court for the Southern District of New York against Respondents DLJ and SB alleging (among other charges) that during prior arbitration Respondents engaged in ex parte communication with the arbitrators, deliberately presented perjured testimony to the arbitrators and bribed the arbitrators. District Court dismissed the complaint under Fed. R. Civ. P. Rule 12 (b)(6) on the ground that Mian did not have a right to sue under Section 1981. Court of Appeals vacated the dismissal and allowed Mian to file his complaint under § 1981. See Mian v.

Donaldson, Lufkin & Jenrette Securities Corp. et al., 7 F. 3d 1085 (2d Cir. 1993). Mian amended his complaint and Respondents DLJ and SB filed speaking motion[3] to dismiss (stating false statements in their defense) under F.R.Civ.P. 12(b)(6). Therefore, Mian filed a summary judgment motion and amended his complaint again. While Respondent's motion to dismiss was pending they filed a duplicate motion titled as "partial summary judgment motion" along with affidavit by Mr. Brian F. Amery[4]. Mr. Amery's affidavit contained vague statements and outright lies[5] without any supporting evidence. Mian filed a counter affidavit with supporting

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3. The ORDER did not address the issue of 'speaking motion' by defendants and their false statements therein but the ORDER wrongfully blames Mian for initiating the introduction of outside facts in his pleading.

4. Mr. Amery is a commercial agent of DLJ, he is a witness and an alleged wrongdoer.

5. Lying about sending FAXES to Mian.

evidence which showed that Mr. Amery and Mr. Edward G. Turan[6] engaged in ex parte communication with the arbitrators, deliberately presented perjured testimony to the arbitrators and bribed the arbitrators. Respondents did not challenge Mian's affidavit with a counter affidavit[7] or provided any evidence to the contrary. District Court, without investigation, relied only on Respondents' misleading papers (and assumed defendants' false statements and contorted restatement of Mian's allegations as facts, Court of Appeals assumed as true what the District Court assumed, see App.A&B) and dismissed Mian's complaint without addressing the issues of ex parte communication, deliberate presentation of perjured testimony, bribery,

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6. Mr. Turan represented SB, he is a witness and an alleged wrongdoer.

7. ORDER did not address this issue.

unequal treatment, departure from normal procedures or the application of McDonnell-Douglas test. Despite Mian's pleadings to address these issues (and without Opinion) the Court of Appeals affirmed the ORDER (App.B) on June 2, 1995 (App.A).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons:

I. **Second Circuit's Ruling Is In Conflict With Other Circuits In That Other Circuits Hold That Ex Parte Communication, Presentation Of Perjured Testimony And Bribery In Arbitration Are Fraud While Second Circuit Considers Such Acts As Negligible.**

Second Circuit's affirmation of ORDER conflicts with the rulings of Supreme Court, 9th, 5th and 6th circuits and even conflicts

with it's own ruling earlier in this case.

9th Circuit held that ex parte communication with arbitrator is fraud. See Pacific & Arctic Railway v. United Transportation Union, 952 F.2d 1144, 1148 (9th Cir. 1991).

Private communication with arbitrators is corruption and is use of "undue means" and is not normal procedure of arbitration, because it throws shadow of suspicion on the entire proceeding and is not negligible[8].

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8. Vacating the arbitration award the court held that "We find the claim regarding the private communications to be dispositive and therefore need not consider the others [other claims]" Goldfinger v. Lisker, 500 N.E. 2d, 857, 858 n.2 (N.Y.1986).

Ex parte contact raises a presumption that the arbitration award was procured by fraud, corruption or other "undue means". Hahn v. A.G.Becker Paribas, Inc., 518 N.E. 2d 218, 223 (Ill.App. 1 Dist. 1987). Ex parte contact invalidates the entire award. *Id*, at p.225. Here Appeals court affirmed vacating of award by lower court because NASD/ARBITRATORS received ex parte information from a party and used such information to make a ruling. *Id*, at p.221.

"Ex parte receipt of evidence by arbitrators from one party without notice to the other party, was 'misbehavior' prejudicial to the innocent party's rights, Totem Marine Tug and Barge, Inc. v. North American Towing, Inc., 607 F.2d 649, 653 (5th Cir.1979)" Hahn v. A.G.Becker Paribas, Inc., 518 N.E. 2d 218, 224 (Ill.App. 1 Dist. 1987).

9th Circuit held that "obtaining an award through perjury is fraud" Pacific & Arctic Railway at 1148.

2d Circuit earlier held that "...allegations of deliberate presentation of perjured testimony in arbitration proceeding would state a claim under § 1981 (citing Prather v. Dayton Power & Light Co., No. C-3-85-491, 1989 U.S.Dist. LEXIS 10734, at *10 (S.D.Ohio Aug. 14, 1989), aff'd, 918 F.2d 1255 (6th.Cir. 1990), Cert. denied, 111 S.Ct. 2889 (1991))" Mian v. Donaldson,

Lufkin & Jenrette Securities Corp. et al., 7 F. 3d 1085, 1087 (2d Cir. 1993).

9th Circuit held that bribery of arbitrator is not acceptable arbitration procedure. "Where one party bribes the supposedly neutral arbitrator, no matter what the other party argues he is doomed to lose because the case is not being decided on its merits." Pacific & Arctic Railway at 1148.

Supreme Court held that pecuniary interest constitutes the use of 'undue means' and that "a decision should be set aside where there is the 'slightest pecuniary interest' on the part of the judge (applying same standard to the arbitrators)" Commonwealth Corp. v. Casualty Co. 393 U.S. 145, 148 (1969).

II. Second Circuit's Ruling Is In Conflict With Other Circuits In That Other Circuits Hold That Departure From Normal Procedures Can Supply Evidence Of Discriminatory Intent While Second Circuit Declines to Consider Such Departures.

Ex parte communication with the arbitrators, deliberate presentation of perjured testimony to the arbitrators and bribery are not normal procedures of arbitration and using these procedures against Mian, only, is departure from the norm in the extreme and, therefore, Second Circuit's affirmation of ORDER conflicts with the rulings of Supreme Court, third circuit, 11th circuit and ruling of district court in 2d circuit.

Supreme Court has held that "In many cases, it is rare to find direct evidence of

discriminatory intent and purposeful discrimination must instead be inferred from the totality of the circumstances. Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040,48 L.Ed.2d 597 (1976)" Blair v. Philadelphia Housing Authority, 609 F.Supp. 276 (D.C.Pa. 1985). And that in order to show purposeful intent the court may consider "proof of departures from the normal procedural sequence" (citing Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-268, 97 S.Ct. 555, 562-565, 50 L.Ed.2d 450 (1977)) Gibralter v. City of New York, 612 F.Supp. 125, 129 (D.C.N.Y. 1985).

11th Circuit held that "departure from normal procedures can supply evidence of discriminatory intent" Brown v. American Honda Motor Co., Inc. 939 F.2d 946,951,(11th Cir.1991). Cert. denied 112 S.Ct.935; Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981).

III. Second Circuit's Procedure Is In Conflict With Other Circuits In That Other Circuits Apply The McDonnell-Douglas Test To Summary Judgment Proceedings In Non-Employment Discrimination Section 1981 Title 42 U.S.C. Claim Where Second Circuit Refuses To Even Consider Or Address It's Application.

Second Circuit's avoidance of McDonnell Douglas test is not in following with the Supreme Court's guidance.

Supreme Court has held that McDonnell Douglas test "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination" Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978)(cited by T & S Service Associates,

Inc. v. Crenson, 666 F.2d 722, 724 (1st Cir. 1981)).

11th Circuit has applied McDonnell Douglas test to summary judgment proceeding in non-employment § 1981 claim: "The Supreme Court has held that the test for intentional discrimination in suits under § 1981 is the same as the formulation [McDonnell Douglas/ Burdine framework] used in Title VII discriminatory treatment causes. (citing Patterson v. McLean Credit Union, 491 U.S. at 185-87, 109 S.Ct. 2377-78, 105 L.Ed.2d at 156-57 (1989))" Brown, *supra*, at 949.

"Under the familiar McDonnell Douglas/Burdine framework the court employs a three part test designed to determine the motivation of the defendant in taking the challenged action. (citing Texas Dept. of Comm. Affairs v. Burdine, 4450 U.S. 248, 101 S.Ct.1089, 67 L.Ed.2d 207 (1981))" Brown, *supra*, at 949.

"McDonnell Douglas/Burdine test is designed to ease burdens on discrimination plaintiffs when direct evidence of discrimination is lacking. (citing Grigsby v. Reynolds Metals Co. 821 F. 2d 590 at 595 (11th Cir. 1987))" Brown, *supra*, at 950:T & S Service at 724("the Supreme Court set forth a methodology [McDonnell Douglas/ Burdine test] for evaluating evidence in cases alleging purposeful discrimination where direct proof of intent is lacking").

Second Circuit did not apply the McDonnell Douglas test and did not even state as to why it would not follow the Supreme Court's guidance to do so despite repeated pleadings by the petitioner.

This Court should grant certiorari here to rule that ex parte communication, deliberate presentation of perjured testimony and bribery, are not normal procedures in arbitration and are not

lawfully acceptable, that unequal treatment via departure from normal procedures can supply evidence of intent to discriminate and that McDonnell-Douglas test applies to summary judgment proceedings in non-employment discrimination claims under Title 42 U.S.C. § 1981.

CONCLUSION

For all the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully Submitted

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June 23, 1995

FXA

APPENDIX A

SDNY (nyny)
Stanton
92-cv-3917

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York on the second day of June, one thousand nine hundred and ninety five.

PRESENT:
HON. FRANK X. ALTIMARI,
HON. J. DANIEL MAHONEY,
HON. JOHN M. WALKER, JR.,

Circuit Judges.

TUAHA MIAN,

Plaintiff-Appellant,

v.

94-7972

DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION, a Delaware Corporation, *and* SMITH BARNEY, HARRIS UPHAM & CO., INCORPORATED, a Delaware Corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came to be heard on the transcript of record from United States District Court for the Southern District of New York, and was argued pro se by plaintiff-appellant and by counsel for defendants-appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Plaintiff-appellant Tuaha Mian ("Mian") appeals pro se from a judgment of the United States District Court for the Southern District of New York (Stanton, J.), granting partial summary judgment for defendants-appellees Donaldson, Lufkin & Jenrette Corp. ("DLJ") and Smith Barney Harris Upham & Co.Inc.("Smith Barney") (collectively, "defendants"), dismissing Mian's remaining claims, and denying various motions by Mian.

On June 1, 1992 Mian filed a complaint

in the district court against DLJ and Smith Barney, alleging that they conspired to discriminate against him on the basis of race and national origin, in violation of 42 U.S.C. §§ 1981, 1985(3), and 1986. The discrimination allegedly occurred in the course of an arbitration before a panel of the National Association of Securities Dealers ("NASD"). Mian argued that defendants had mishandled the accounts he maintained with them; specifically, he claimed to have sustained losses due to defendants' failures to keep him adequately informed as to his accounts while he was in Pakistan from July to October 1987. In preparing for the arbitration, DLJ sought background information regarding Mian's place and date of birth, and requested copy of his passport to corroborate his whereabouts during the relevant period. In response to defendants' motion to

consolidate the arbitration, Mian informed NASD by letter that he did not object, provided that defendants would "be prohibited from ganging up on me." Ultimately, Mian's claims were dismissed by the NASD.

Mian subsequently filed the instant action, which the district court initially dismissed under Fed. R. Civ. P. 12(b)(6) on the ground that Mian did not timely seek to vacate the arbitration award. This Court vacated the dismissal and remanded with instructions to give Mian the opportunity to amend his complaint. See Mian v. Donaldson, Lufkin & Jenrette Securities Corp., 7 F.3d 1085 (2d Cir. 1993)(per curiam). We stated, however, that "Mian's complaint fails to offer more than conclusory allegations that he was discriminated against because of his race." Id. at 1088.

On remand, Mian amended his complaint

to attempt to state a claim under the legal standards we articulated when vacating the dismissal of his claims. The only allegations he made that were remotely related to a claim of discrimination on the basis of race or national origin were that defendants (1) requested a copy of his passport to infect the arbitration with racial bias and (2) refused to accept his offer to enter into a "race neutral contract" under which he would consent to consolidating the proceedings if they would not "gang up" on him. Defendants moved to dismiss under Rule 12 (b)(6), in response to which Mian filed a motion to amend and a second amended complaint. Defendants opposed the motion to amend, and argued that the second amended complaint should have been dismissed for the same reasons as the first amended complaint. Subsequently, both parties filed motions for partial summary

judgment. Mian also filed a variety of motions, including motions to strike several affidavits.

By Memorandum and Order dated September 8, 1994 the district court denied Mian's motion for partial summary judgment and his various motions. The district court also granted defendants' motion for partial summary judgment with respect to the claim under § 1981 on the grounds that Mian's factual allegations did not support an inference of discrimination and were conclusory. See Mian, 7 F.3d at 1087 (Plaintiff under §1981 must establish "an intent to discriminate on the basis of race"). Moreover, defendants offered nondiscriminatory reasons for their conduct: they sought general background as a matter of course and sought the passport to corroborate Mian's absence from the country. The district court also granted defendants'

motion to dismiss Mian's first amended complaint pursuant to Rule 12(b)(6) on the grounds that Mian's allegations could not support a claim of "class-based, invidious discriminatory animus." See id. at 1087-88 (setting forth requirements for claims under §§ 1985(3) and 1986). Mian now appeals, challenging, among other things, the district court's rulings regarding his claims under §§ 1981, 1985(3), and 1986.

We review a grant of summary judgment de novo to determine whether a genuine issue of material fact exists that precludes judgment as a matter of law for the moving party. See Gallo v. Prudential Residential Services, L.P., 22 F.3d 1219. 1223-24 (2d Cir. 1994). Similarly, we review de novo a dismissal under Rule 12(b)(6) to determine if it appears that a plaintiff can prove no set of facts entitling him to relief, See Sykes v. James, 13 F.3d 515, 518-19 (2d Cir.

1993), cert. denied, 114 S.Ct.2749 (1994). After thoroughly reviewing the record and considering Mian's arguments, and construing his pleadings liberally, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam), we affirm for substantially the reasons stated by the district court. As to Mian's arguments that were not addressed by the district court, we reject them as lacking in merit.

/s/

HON. FRANK X. ALTIMARI,

/s/

HON. J. DANIEL MAHONEY,

/s/

HON. JOHN M. WALKER,JR.,

Circuit Judges.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TUAHA MIAN, Plaintiff, -against- DONALDSON, LUFKIN & JENRETTE SECURITIES CORP. and SMITH BARNEY, HARRIS UPHAM & CO.,INC: Defendants.	MEMORANDUM AND ORDER 92 Civ.3917 (LLS)

Plaintiff Tuaha Mian ("Mian") sues defendants Donaldson, Lufkin & Jenrette Securities Corp. and Smith Barney, Harris Upham & Co., Inc. (collectively, "defendants") under 42 U.S.C. §§ 1981, 1985(3) and 1986, claiming that during an arbitration proceeding defendants discriminated against him because of his race.[1] He also asserts claims under the Racketeer Influenced and Corrupt

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1. As Mian states, "Racial discrimination is an essential element of this case..." (Pl.'s Mem. Supp. Summ. J. at 1; see also First Am. Compl. ¶ 1)("This is

Organizations Act, 18 U.S.C. §§ 1961 et seq. ("RICO").

BACKGROUND

By Memorandum Endorsement dated

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an action alleging racial discrimination, and conspiracy by two or more defendants individually and collectively victimizing plaintiff Tuaha Mian during arbitration proceedings in violation of 42 U.S.C.A. § 1981, 42 U.S.C.A. § 1985(3) and 42 U.S.C.A. § 1986").

Mian's First Amended Complaint alleges nineteen causes of action. The first seventeen of these, denominated "Racial Discrimination I" (First and Second Causes of Action) "Racial Discrimination II" (Third and Fourth Causes of Action), "Panel Tampering" (Fifth and Sixth Causes of Action), "Witness Concealing and Tampering" (Seventh and Eighth Causes of Action), "Perjury" (Ninth and Tenth Causes of Action), "Bribery" (Eleventh and Twelfth Causes of Action), "Tape Record Destruction" (Fourteenth and Fifteenth Causes of Action), and False Official Statements" (Sixteenth and Seventeenth Causes of Action), are based on 42 U.S.C. §§ 1981, 1985(3) and 1986, coupled with allegations that defendants violated various state and federal criminal laws. (See First Am. Compl. at ¶¶ 85-108.) The Eighteenth and Nineteenth Causes of Action, titled "Racketeering", claim violations of 42 U.S.C. §§ 1981, 1985(3) and 1986, and RICO. (See First Am. Compl. at ¶¶ 109-110.)

September 24, 1992, this court dismissed Mian's complaint, holding that "Having failed to move within three months to vacate the arbitration award, he cannot obtain the same result by this collateral attack." (citations omitted). On October 18, 1993,the Court of Appeals for the Second Circuit vacated that judgment, holding that Mian's failure to move to vacate the arbitration did not foreclose his claims of alleged violations of his civil rights during the arbitration. However, the Court of Appeals also determined that Mian's complaint "fails to adequately plead the essential elements of his causes of action." Tuaha Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087 (2d Cir. 1993)(per curiam). After stating the elements of claims under §§ 1981, 1985(3) and 1986, the Court of Appeals remanded the case "to give Mian the opportunity to amend his complaint in

accordance with this opinion." Id. at 1088.

Plaintiff filed his first Amended Complaint on November 30, 1993. Defendants moved to dismiss it pursuant to Fed.R Civ. P. 12 (b)(6) and 9(b). On January 20, 1994, Mian submitted his opposition to defendants' motion to dismiss; he also submitted a motion to amend, and a Second Amended Complaint. In their Reply Memorandum, defendants oppose Mian's motion to amend, and alternatively argue that the Second Amended Complaint should be dismissed for essentially the same reasons raised in their motion to dismiss the First Amended Complaint.

On March 2, 1994, Mian wrote the court requesting permission to file a motion for partial summary judgment on the First and Second Causes of Action. and for a default judgment. Permission was granted, and Mian filed that motion on April 4. Defendants

then cross-moved for partial summary judgment.

Mian submitted reply papers on his motion for partial summary judgment on May 20. He also filed motions to strike two affidavits submitted by defendants in support of their cross-motion, and motion to strike defendants' cross-motion for summary judgment. On June 8,[2] defendants submitted reply papers on their motion for partial summary judgment, and in opposition to Mian's motion for partial summary judgment and his motions to strike. On June 23, Mian submitted his reply papers on his motions to strike.

DISCUSSION

1. Plaintiff's motion for partial summary judgment and for default judgment.

The crux of Mian's motion for partial

2. Also on June 8, without a decision on his pending motion for leave to file his Second Amended Complaint, Mian filed a purported Third Amended Complaint.

summary judgment and for a default judgment is his claim that defendants failed to respond to the First and Second Amended Complaints and the affidavit he submitted in opposition to defendants' motion to dismiss. He contends that defendants have therefore conceded the allegations made in those documents. and those "conceded" facts entitle him to summary judgment. Mian also asserts that defendants "violated lawyer witness rule, asserted positions on two occasions to maliciously injure plaintiff Mian and again violated F.R.Civ.P. Rule 11 in filing the local rule 9 certificate," and that the "pattern of violations constitute dilatory and abusive litigation strategy and, therefore, entitles plaintiff Mian to a default judgment." (Pl. Mem. Supp. Summ. J. at 3.)

Defendants have not failed to respond to the First Amended Complaint; indeed, they

filed a motion to dismiss it under Fed. R. Civ. P. 12(b)(6) and 9(b). Neither have defendants "defaulted" on any allegations of the Second Amended Complaint: although Mian filed his Second Amended Complaint on the same day as his motion for leave to amend, defendants had no obligation to respond to any of the allegations it contained unless and until the court granted Mian's motion to amend. In the absence of an obligation to respond, none of its allegations or statements will be deemed conceded.

Mian argues that filing his affidavit of January 20, 1994, automatically converted defendants' motion to dismiss into a motion for summary judgment, and thereby triggered an affirmative obligation to rebut the statements in the affidavit. Defendants failure to submit an opposing affidavit, he claim, entitles him to summary judgment. However,

> Rule 12(b) gives district courts two options when matters outside the pleadings are presented in response to a 12(b)(6) motion: the court may excluded the additional material and decide the motion on the complaint alone or it may convert the motion to one for summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity to present supporting material.

Fonte v. Bd. of Managers of Continental Towers Condo., 848 F.2d 24, 25 (2nd Cir. 1988)(citing Fed. R. Civ. P. 12(b) and Wright & Miller). Thus, the conversion of a motion to dismiss lies in the discretion of the court, not the parties. See Cole v. World Wrestling Fed'n, 155 F.R.D. 27, 28 n.2 (N.D.N.Y. 1994) ("At oral argument, counsel for defendant Titan asserted that its motion was not in fact a motion to dismiss plaintiff's first cause of action, but instead was one for partial summary judgment. Titan claimed to have accomplished this procedural feat by attaching affidavits and other documents to its motion, thus

placing before the court facts beyond those pled in the complaint... What Titan overlooked, however, is that acceptance of the additional material is discretionary with the court, not mandatory. Only if the court accepts the additional material is the motion then treated as one for summary judgment")(citations omitted); see also 5A Wright & Miller, Federal Practice and Procedure § 1366 at 491 (1990)("The court has complete discretion to determine whether or not to accept any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion"). Accordingly, Mian's affidavit in opposition to defendants' motion to dismiss did not automatically convert it to one for summary judgment, and defendants will not be deemed to have conceded the truth of its statements. Moreover, because Mian subsequently moved for partial summary

judgment, and defendants have opposed that motion and cross-moved for partial summary judgment, they have not failed to oppose the statements contained in Mian's affidavit of January 20, 1994.

None of Mian's additional allegations of misconduct entitle him to summary judgment. Accordingly, Mian's motion for a default judgment and for partial summary judgment is denied.

2. Plaintiff's motions to strike

Mian's motions to strike defendants' cross-motion for partial summary judgment and certain affidavits in support thereof are predicated on the same argument which underlies his motion for a default judgment and for partial summary judgment: that defendants have conceded some of the factual and legal assertions contained in Mian's Second Amended Complaint and his affidavit of January 20, 1994. For the reasons stated

above, this argument is rejected and the motions to strike are denied.

3. Defendants' cross-motion for partial summary judgment

(a) General Principles

Summary Judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). As the Court of Appeals recently stated in Cement and Concrete Workers District Council Welfare Fund, Pension Fund, Legal Services Fund and Annuity Fund v. Lollo, Nos. 93-7845 & 93-7847, slip op. 4921, 4925, 1994 WL 265059, at *2 (2d Cir. June 16, 1994) (citations omitted), "In order to prevail on a motion for summary judgment, the moving party must

show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. In deciding such a motion, the district court 'must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor.'" if a motion for summary judgment is properly supported, "the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986)(footnote omitted) (quoting Fed. R. Civ. P. 56(e)).

A claim under § 1981 consists of three elements: "(1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i.e., make and

enforce contracts, sue and be sued, give evidence, etc.)." Mian, 7 F.3d at 1087 (citations omitted).

For the purposes of this motion, pro se plaintiff Mian's submissions must be construed liberally, see Haines v. Kerner, 404 U.S. 519, 520-521, 92 C.Ct. 594, 595-596 (1972); Hanlin v. Mitchelson, 794 F.2d 834, 838-39 (2d Cir. 1986).

(b) Mian's claim

Mian asserts that defendants' intent to discriminate on the basis of his race is demonstrated by certain requests for information they made during the arbitration proceedings, and by defendants' request to consolidate the arbitration proceedings Mian had initiated against them individually. According to Mian, defendants' requests for information concerning his place of birth, his passport, and his honeymoon were actually subtle references to his East

Indian race which were designed to discriminate against him and to invite others to discriminate against him on that basis. He asserts this is apparent because his whereabouts were not called into question by his arbitration claims. Moreover, he contends that his response to defendants' request to consolidate the arbitration proceedings, set forth in the margin,[3] constituted an offer of a

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3. After defendants moved to consolidate the arbitration proceedings Mian had instituted against them, the NASD requested a response from Mian concerning that application, On June 11, 1990, Mian wrote the NASD staff attorney, stating:

> In response to your above mentioned letter regarding the Respondent's request to consolidate the above cases for a common hearing, I hereby indicate no objection only when the status of both of my cases remains the same, including the status of my Appeals and Motions, status of my correspondence with each and individual Respondent, and both parties (Respondents, their attorneys and the Brokers be prohibited from ganging up on me.

(Amery Aff., Ex. H).

"race-neutral" contract, and that defendants understood it as such, Mian claims that defendants rejected that "offer" in violation of § 1981.

(c) Defendants' showing

In support of their motion, defendants have submitted affidavits stating that the information they requested either was general background material sought as a matter of course in discovery (see McMenamy Aff. ¶¶ 5-7; Amery Aff. ¶ 15), or was intended to define Mian's whereabouts during the time of stock trading on which his arbitration claims were based. They state that these requests were relevant to the issues in the arbitration proceeding because they understood him to complain about not being kept properly informed when he was overseas for substantial periods, (see Amery Aff. ¶¶ 10-14), and that they sought consolidation because Mian's complaint

against, and portfolio with, each defendant were virtually identical.(see Amery Aff. ¶¶ 19-23.)

(d) Conclusion

The facts from which Mian wishes to draw an inference of racial discrimination will not support his § 1981 claim. Defendants have articulated nondiscriminatory reasons for their conduct, and have supported those assertions by affidavit. In response, Mian offers no more than conclusory assertions. Construing Mian's submissions liberally, and drawing all reasonable inferences in his favor, he offers no evidence from which a reasonable trier of fact could find that defendants' inquiries bore the subtle meanings he suspects. Accordingly, defendants are entitled to summary judgment dismissing his § 1981 claims. See Lund's Inc. v. Chemical Bank, 870 F. 2d 840, 844 (2d Cir. 1989).

4. Defendants' motion to dismiss the First Amended Complaint

Defendants have moved to dismiss Mian's First Amended Complaint.[4] On such a motion under Fed. R. Civ. P. 12(b)(6),

> a district court must construe any well-pleaded factual allegations in the complaint in favor of the plaintiff, and may dismiss the complaint only where "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" This caution applies with greater force where the complaint is submitted pro se or the plaintiff alleges civil rights violations.

Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993)(citations omitted), cert. denied, 114 S.Ct. 2749 (1994); Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991).

Even liberally construed, however, the complaint fails to state a claim under

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4. Mian's claims under § 1981 having been dismissed, the motion to dismiss need be considered only as against the remaining claims of the First Amended Complaint, which are those under §§ 1985(3), 1986, and RICO.

§1985. According to the Court of Appeals,

> [t]he four elements of a § 1985(3) claim are: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States. Furthermore, the conspiracy must also be motivated by "some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action."

Mian, 7 F.3d at 1087-88 (citations omitted). As explained above, Mian's allegations are insufficient to support a claim of a "class-based, invidious discriminatory animus." The First Amended Complaint thus fails to state a claim under § 1985(3).

Because "a § 1986 claim must be predicated on a valid § 1985 claim," Id. at 1088 (citation omitted), Mian's claims under 42 U.S.C. § 1986 are also dismissed.

To the extent that Mian's Eighteenth and Nineteenth Causes of Action, denominated

"Racketeering," seek to state a RICO claim, they fail to do so because the allegations in the First Amended Complaint do not satisfy RICO's pattern requirement. See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239, 242-43, 109 S.Ct. 2893, 2900, 2902 (1989)("[T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.") (emphasis in original). Although the alleged predicate acts occurred over a period of several years, the First Amended Complaint does not allege facts showing that the defendants' conduct presents a threat of continuity sufficient to establish a pattern of racketeering activity. Rather, they are a set of closed-ended acts involving one victim. See Mead v. Schaub, 757 F. Supp. 319. 323 (S.D.N.Y. 1991) ("A critical factor

in determining whether the predicates are 'continuing' under RICO is the terminable quality of the goal or purpose of the enterprise"; five-year scheme with single, terminable goal insufficient); Deem v. Lockheed Corp., 1991 WL 196171, at *10, 1991 U.S Dist. LEXIS 13216, at *25 (S.D.N.Y. Sept. 25, 1991)("There is no threat of continuity where a defendant commits the predicate acts solely for the purpose of accomplishing a single limited scheme unlikely to be repeated"); Continental Realty Corp. v. J.C. Penny Co., Inc., 729 F.Supp. 1452, 1454-56 (S.D.N.Y. 1990) ("several acts of mail and wire fraud over a period of more than one year, " held "too short a time period to constitute the 'long-term criminal conduct' required by H.J., Inc."); Airlines Reporting Corp. v. Aero Voyagers, Inc., 721 F.Supp. 579, 584-85 (S.D.N.Y. 1989) ("closed-ended, single

scheme involving three perpetrators (a company and two directors), one victim, and an uncomplicated transaction (essentially relating to a simple breach of contract)", occurring over thirteen months, insufficient).

5. Mian's motion to amend

Mian's motion for leave to amend is denied. Construing the proffered Second and Third Amended Complaints liberally, and mindful of the fact that leave to amend "shall be freely given when justice so requires," Fed. R. Civ. P. 15(a), it is apparent that allowing the submission of either the Second or Third Amended Complaint would be futile. Neither of them offers anything beyond conclusory assertions that defendants discriminated against Mr. Mian because of his race. Accordingly, it would serve no purpose to amend the complaint by replacing it with those documents. See

Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962); Health-Chem Corp. v. Baker, 915 F.2d 805, 810 (2d Cir. 1990) ("Although Fed. R. Civ. P. 15(a) provides that leave to amend should be given freely when justice so requires, where, as here, there is no merit in the proposed amendments, leave to amend should be denied"); Peirez, Ackerman & Levine v. Starr, No. 92 Civ. 7958 (PKL), 1994 WL 48811, at *2 (S.D.N.Y. Feb. 17, 1994) ("A futile amendment is one that is clearly frivolous or advances a claim that is legally insufficient on its face, suggesting no colorable ground for relief").

Mian has been afforded ample opportunity to amend his complaint. In its opinion, the Court of Appeals emphasized that Mian's complaint had offered only conclusory allegations that the alleged discrimination against him was race-based, even though more than that is required to

state a claim under the civil rights laws. Mian, 7 F.3d at 1088 ("We emphasize that an essential element to each cause of action is a requirement that the alleged discrimination took place because of the individual's race. At this point, Mian's complaint fails to offer more than conclusory allegations that he was discriminated against because of his race.") Because Mian has been given the chance to amend his complaint to rectify this defect, and because the First, Second, and Third Amended Complaints fail to offer anything more than conclusory assertions that the alleged discrimination by defendants occurred on account of Mian's race, the Clerk is directed to dismiss the complaint with prejudice.

CONCLUSION

Plaintiff's motion for a default judgment and for partial summary judgment is

denied. Plaintiff's motions to strike are denied. Defendant's cross-motion for partial summary judgment on Mian's § 1981 claims is granted. Defendants' motion to dismiss Mian's claims under §§ 1985(3) and 1986, and his RICO claims, is granted. Plaintiff's motions for leave to file the Second and Third Amended Complaints are denied. The clerk is directed to dismiss the complaint, with prejudice.

So ordered.

Dated: New York, New York
September 8, 1994

/s/

LOUIS L. STANTON
U.S.D.J.